Niino & Co Ltd v Kow Lup Kai

HIGH COURT (SABAH) — CIVIL SUIT NO K180 OF 1991
SYED AHMAD IDID JC
14 SEPTEMBER 1991

Civil Procedure *— Injunction — Application for injunction for preservation of property — Whether within the scope of O 29 r 1 of the Rules of the High Court 1980 — Governing consideration in granting injunction — Maintenance of status quo pending trial — Rules of the High Court 1980 O 29 r 1*

Words and Phrases *— 'Injunction'*

The plaintiff and the defendant (as managing director of Soon Yee Sdn Bhd) signed a loan agreement wherein Soon Yee obtained financial assistance of US$300,000 from the plaintiff on 19 February 1990. A bill of sale between the defendant (called 'the owner') and the plaintiff was signed on the same date when the defendant assigned the chattels by way of security. The plaintiff filed a summons-in-chambers under O 29 r 1 and applied for an order that the defendant shall in writing disclose to the plaintiff the whereabouts of three tractors (or their replacements) and that the defendant shall deliver the said items to the plaintiff within 48 hours.

Held, dismissing the application:

(1) The scope of O 29 gives effect to the powers of the court to provide for the interim preservation of property. The jurisdiction to grant an injunction is always a matter of discretion which is to be exercised in accordance with well-known principles.

(2) A plaintiff wishing to prevent the disposition of goods must show a specific right in the property.

(3) An injunction is a judgment or order to do or refrain from doing a particular thing; it is either interlocutory or perpetual and is also restraining or mandatory. An injunction may be granted to any party to a cause or matter before or after the trial of the cause or matter. It will not be granted to restrain a defendant who is alleged to be a debtor from parting with his property. The governing consideration is the maintenance of the status quo pending the trial. If the court were to grant the injunction in the present case, the status quo would not be maintained.

[Bahasa Malaysia summary

Plaintiff dan defendan (sebagai pengarah urusan Soon Yee Sdn Bhd) telah mengikat satu perjanjian pinjaman di mana Soon Yee telah memperolehi bantuan kewangan US$300,000 daripada plaintif pada 19 Februari 1990. Satu bil jualan di antara defendan (dipanggil 'tuanpunya') dan plaintif telah ditandatangani pada tarikh yang sama apabila defendan menyerahhak catel (chattel) itu sebagai cagaran.

Plaintif telah memfailkan satu saman dalam kamar di bawah A 29 k 1 dan memohon satu perintah bahawa defendan harus mendedahkan dalam tulisan kepada plaintif di mana letaknya tiga buah traktor (atau ganti mereka) dan bahawa defendan harus menyerahkan benda tersebut kepada plaintif dalam masa 48 jam.

Diputuskan, menolak permohonan itu:

(1) Lingkungan A 29 memberikan kuasa kepada mahkamah untuk membuat perintah bagi pemeliharaan sementara harta. Bidang kuasa untuk memberikan injunksi sentiasa satu perkara budi bicara yang harus dijalankan mengikut prinsip yang dikenali.

(2) Seseorang plaintif yang ingin mencegah pelupusan barangan mesti menunjukkan satu hak spesifik ke atas harta itu.

(3) Satu injunksi adalah satu penghakiman mahkamah atau perintah untuk membuat atau menahan daripada membuat sesuatu; ianya sama ada interlokutori atau tetap dan juga sama ada bersifat mencegah atau mandatori. Satu injunksi boleh diberikan kepada mana-mana pihak kepada satu kausa atau perkara sebelum atau selepas perbicaraan kausa atau perkara itu. Ia tidak akan diberikan untuk mencegah seseorang defendan yang didakwa menjadi penghutang daripada berpisah dengan hartanya. Pertimbangan penting ialah pemeliharaan status quo sementara menantikan perbicaraan. Jika mahkamah memberikan injunksi dalam kes ini, status quo tidak akan dipertahankan.]

Cases referred to

1 *Isenberg v East India House Estate Co Ltd* (1863) 3 De GJ & Sm 263; 46 ER 637 (folld)
2 *Gibb & Co v Malaysia Building Society Bhd* [1982] 1 MLJ 271 (refd)
3 *Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yiok* [1975] 2 MLJ 109 (refd)
4 *Texaco Ltd v Mulberry Filling Station Ltd* [1972] 1 All ER 513; [1972] 1 WLR 814 (folld)
5 *Robinson v Pickering* (1881) 16 Ch D 660 (folld)
6 *Siskina, The* [1977] 3 All ER 803; [1977] 3 WLR 818 (folld)

Legislation referred to

Bill of Sale Ordinance (Cap 14) s 4
Rules of the High Court 1980 O 29 r 1

Marina Tiu (*Yap Chin & Tiu*) for the plaintiff.
Norbert Yapp (*Jayasuriya Kah & Co*) for the defendant.

Syed Ahmad Idid JC: The plaintiff filed a summons-in-chambers under O 29 r 1 and applied for an order that the defendant shall in writing disclose to the plaintiff the whereabouts of three tractors (or their replacements) and that the defendant shall deliver the said items to the plaintiff within 48 hours. Order 29 r 1 states:

A (1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.

Mr Yapp, counsel for the defendant, raised a preliminary objection on the
B grounds that —

(i) the summons-in-chambers was misconceived in law and alien to O 29 r 1;
(ii) the plaintiff wants discovery, not an injunction;
(iii) the plaintiff wants specific performance.

C It was additionally submitted that there is no such provision in the Malaysian Rules of the High Court 1980. The English rule, O 29 r 2A, though on similar strain, is derived from an Act of Parliament, ie Torts (Interference with Goods) Act of 1977.

The facts of the matter are that the plaintiff and defendant (as managing
D director of Soon Yee Sdn Bhd) signed a loan agreement wherein Soon Yee obtained financial assistance of US$300,000 from the plaintiff on 19 February 1990. A bill of sale between the defendant (called 'the owner') and the plaintiff was signed on the same date when the defendant assigned the chattels by way of security. At this stage, there is no need to comment on the form and/or substance of the bill of sale.

E The scope of O 29 gives effect to the powers of the court to provide for the interim preservation of property. The jurisdiction to grant an injunction is always a matter of discretion which is to be exercised in accordance with well-known principles. It has been said that the power of granting mandatory injunctions must be exercised with the greatest possible care: *Isenberg*
F *v East India House Estate Co Ltd.*[1]

What is an injunction? *Stroud's Judicial Dictionary* (4th Ed) Vol 3 p 1369 defines an injunction as a *judgment*, or *order*, to do or refrain from doing a particular thing. It is either (1) interlocutory or interim, ie an order until the hearing of the action or further order; or (2) perpetual, ie a judgment determining and concluding the right in litigation; it is also (a) restraining,
G ie when it inhibits the doing of anything; or (b) mandatory, ie when it commands the doing, or restoring, of anything.

Miss Marina Tiu, counsel for the plaintiff, cited the cases of *Gibb & Co v Malaysia Building Society Bhd*[2] and *Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yiok*[3] where Abdoolcader J delivered both judgments.
H Miss Tiu added that the plaintiff was asking for an order to compel the defendant to disclose and deliver the vehicles which 'the plaintiffs are entitled to seize under the bill of sale'. The Bill of Sale Ordinance (Cap 14) in fact at s 4 sets out the procedure for the taking of possession of items which are the subject matter of the bill. She added that 'the order is to prevent dissipation of the tractors, the subject matter of the bill of sale'. To
I this Mr Yapp's response was that in order to obtain specific performance, the Rules of the High Court 1980 provides a different procedure, ie under O 81. I may add that as a general rule the proper remedy of a person seeking to enforce the observance of a positive contract or covenant is by way of an action for specific performance.

An injunction may be granted to any party *to a cause or matter* before or after the trial of the *cause or matter* ... (O 29 r 1). I have examined the plaintiff's writ of summons dated 22 August 1991 where the plaintiff claimed against the defendant (1) an *injunction* to compel the defendant to disclose to the plaintiff the whereabouts of the three tractors; (2) costs; and (3) such further or other relief. So really the *cause* or *matter* is the same as the order applied for under the summons-in-chambers dated 5 September 1991 under O 29 r 1. A plaintiff wishing to prevent the disposition of goods must show a specific right in the property.

I am not satisfied that I can grant an injunction on such facts. It would appear that the plaintiff has thought out this ingenious method to enforce his rights under an agreement but not in accordance with the rules or procedure allowed under the law. No doubt there is strength in the reminder that '... the governing consideration is the maintenance of the status quo pending the trial ...'. See *Texaco Ltd v Mulberry Filling Station Ltd.*[4] What status quo do we maintain if I were to grant this injunction? There is none except to enforce the rights which the plaintiff claims under the so-called loan agreement and/or the bill of sale.

The court sympathizes with the plaintiff as it would appear that the defendant is not co-operating but placing obstacles. An injunction will not be granted to restrain a defendant who is alleged to be a debtor from parting with his property: *Robinson v Pickering.*[5] See *The Siskina.*[6] Always bear in mind that one who goes into any agreement must realise the pitfalls and dangers and know the risks and the legal methods for remedy. Outside that I cannot assist the plaintiff and accordingly I dismiss the summons-in-chambers dated 5 September 1991. I shall make no order as to costs.

Application dismissed.

Reported by Neoh Lay Choo